Supreme Court, U.S.
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NO.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

RITA FULLER, BABBETTE THAYER, THOMAS WILSON, and the class of similarly situated persons who have worked aboard the F/T MICHELLE IRENE,

Petitioners,

v.

GOLDEN AGE FISHERIES, SIMONSON ENTERPRISES V, INC., MICHELLE IRENE JOINT VENTURE, WESTCOD II, INC., BTI IV, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 21, 1994

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I. QUESTIONS PRESENTED FOR REVIEW

A. Is a clause in seamen's employment contracts that purports to limit the seamen's time to bring claims under the contract to six months enforceable against the seamen, who are wards of the federal admiralty court, when the clause was not negotiated, not supported by consideration, and where the seamen did not understand the consequences of the limitation clause, nor even realize that the clause was present in their contracts?

B. Does 46 U.S.C. § 10602, which gives to those fishermen (a) who sign written employment contracts and (b) whose fish are "delivered to the owner for processing and sold," a remedy for an accounting, for punitive damages if the accounting is not rendered, and for wages, so occupy the field of fishermen's wage claims that it preempts the ancient maritime common law right of fishermen to a wage lien?

II. PARTIES

Rita Fuller, Babbette Thayer, Thomas Wilson and the class of similarly situated persons who worked aboard the F/T *Michelle Irene* were the plaintiffs and appellants below, and are the petitioners here.

Golden Age Fisheries, Simonson Enterprises V, Inc., Michelle Irene Joint Venture, Westcod II, Inc., BTI IV, Inc., BTI VII, Inc., Bellingham Trawlers, Inc., Simonson Investments, Inc., Stanley Simonson and Jane Doe Simonson, James Talbot and Jane Doe Talbot, and F/T *Pacific Orion* (formerly *Michelle Irene*), official number 940866 were defendants and respondents below and are respondents here.

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V. OPINIONS BELOW

The United States District Court for the Western District of Washington dismissed plaintiffs' claims on summary judgment. *Fuller v. Golden Age Fisheries*, 1992 AMC 1696 (W.D. Wash. 1992)(See App. B). The Court of Appeals for the Ninth Circuit affirmed. *Fuller v. Golden Age Fisheries*, 14 F.3d 1405 (9th Cir. 1994)(See App. A).

VI. JURISDICTIONAL STATEMENT

The Court of Appeals opinion was filed on January 24, 1994. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254 (1).

VII. RELEVANT STATUTES

The following statutes are relevant to this matter:

46 U.S.C. §10601. Fishing agreements

> (a) Before proceeding on a voyage, the master or individual in charge of a fishing vessel, fish processing vessel, or fish tender vessel shall make an (sic) fishing agreement in writing with

each seaman employed on board if the vessel is--

(1) at least 20 gross tons; and
(2) on a voyage from a port in the United States.

(b) The agreement shall be signed also by the owner of the vessel.

(c) The agreement shall--

(1) state the period of effectiveness of the agreement;
(2) include the terms of any wage, share, or other compensation arrangement peculiar to the fishery in which the vessel will be engaged during the period of the agreement; and
(3) include other agreed terms.

46 U.S.C. §10602. Recovery of wages and share of fish under agreement.

(a) When fish caught under an agreement under section 10601 of this title are delivered to the owner of the vessel for processing and are sold, the vessel is liable in rem for the wages and shares of the proceeds of the seamen. An action under this section must be brought within six months after the sale of the fish.

(b)(1) In an action under this section, the owner shall produce an accounting of the sale and division of proceeds under the agreement. If the owner fails to produce the accounting, the vessel is liable for the highest value alleged for the shares.

(2) The owner may offset the value of general supplies provided for the voyage and other supplies provided the seaman bringing the action.

(c) This section does not affect a common law right of a seaman to bring an action to recover the seaman's share of the fish on proceeds.

VIII. STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This class action lawsuit for seaman's wages was filed on October 6, 1991 by plaintiffs Rita Fuller, Babbette Thayer and Thomas Wilson as representatives of a class of approximately 300 seamen who worked aboard the factory trawler *Michelle Irene*.[1] The defendants are the vessel, its owners,

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[1] The class covers crew members who worked aboard the vessel from September 23, 1989 to November 21, 1990. Subsequently, the *Michelle Irene* was renamed the *Pacific Orion*.

In 1993, an *in rem* action was commenced against the vessel by Key Bank of Washington, which sought to foreclose a preferred ship mortgage. *Key Bank of Washington et al. v. Pacific Orion*, No. C93-806Z, (W.D. Wash.) Plaintiffs Fuller et al. have intervened in that action to preserve their *in rem* claims while this case is on review.

its managing agent - Golden Age Fisheries - and the partners of Golden Age Fisheries.

The defendants contracted to pay wages equal to a percentage of the estimated fair market value of the seafood caught and processed by the *Michelle Irene*. Plaintiffs allege that defendants breached their employment contracts by intentionally underestimating the value of fish produced by the vessel. Plaintiffs also allege that defendants failed to distribute to the crew its agreed percentage of that underestimated value, which further diluted plaintiffs' pay.[2]

Plaintiffs' *in personam* wage claims were dismissed on summary judgment pursuant a clause in defendants' contract form that

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[2] Plaintiffs also alleged that defendants failed to pay the minimum wage required by the laws of the State of Alaska. The District Court held that Alaska's minimum wage laws were preempted by the Fair Labor Standards Act and the Court of Appeals affirmed. Plaintiffs do not seek review of that portion of the Court of Appeals decision.

required plaintiffs to bring wage claims within six months of the end of each voyage, and plaintiffs' *in rem* wage claims were dismissed pursuant to a limitation period contained in 42 U.S.C. §10602. *Fuller v. Golden Age Fisheries*, 1992 AMC 1696 (W.D. Wash. 1992)(App. B). The Court of Appeals for the Ninth Circuit affirmed. *Fuller v. Golden Age Fisheries*, 14 F.3d 1405 (9th Cir. 1994)(App. A).

Plaintiffs seek review here because this case involves important issues of maritime law -- whether the shipowner can, by contract, impose a six month limitation period on the assertion of seamen's wage claims, and whether Congress has by implication legislated a six month limitations period for all fishermen's wage claims.

The first question turns on whether the Court's traditional protection for its wards, the seamen of this nation, shall retain any real meaning. The courts below

granted summary judgment against the plaintiff seamen based on a six month limitation period contained in the defendants' adhesion contract, despite uncontradicted testimony that (a) there was no consideration for the limitation provision, (b) most of the seamen were not given copies of their contracts, and (c) none of the seamen knew that the limitation provision was contained within their contracts, or had any understanding of its significance. The decision of the Court of Appeals enforcing the shipowner's six month limitation clause acknowledges -- but in reality ignores -- the close scrutiny that this Court demands be given any attempt to diminish the rights of seamen. *See Garrett v. Moore-McCormack Company*, 317 U.S. 239 (1942).

The second question turns on whether Congress intended 42 U.S.C. §10602, which was first enacted by the Second Congress for the sole purpose of ensuring that cod

fisherman receive government salt allowances, to preempt the lien rights enjoyed since ancient times by fishermen as security for their wages. The language of the statute, and the history of its enactment and amendment, show that Congress intended that the statute be an alternate remedy available to fishermen - not the fishermen's sole remedy for unpaid wages. The holding of the courts below is contrary to this court's decisions on the construction of statutes in derogation of the general maritime law, and contrary to the presumption that ambiguous legislation shall be read in a way that is favorable to seamen. *See, Isbrandtsen v. Johnson*, 343 U.S. 779 (1952).

B. Facts Relevant to the Issues on Review

1. The Nature of the Work

The *Michelle Irene* is a modern factory trawler that employs approximately 95 crew members whose job responsibilities include

fishing, fish processing and vessel operation. The vessel leaves on month-long voyages from Dutch Harbor, Alaska for fishing and processing operations in the Bering Sea or the Gulf of Alaska, returning only when her hold is full.

During the class period crew members generally signed contracts to work aboard the vessel for 90 straight days, approximately three fishing trips, after which they recuperated back home. The crew worked brutal hours -- 16 hours a day, seven days a week while the vessel was at sea. After the conclusion of each fishing trip, the vessel was in port no more than 2 or 3 days to unload its catch and take on supplies, all duties which had to be performed by its crew. Then the crew went back to sea again for another month of 16 hour days, another port call, and back out again for one more month at sea until their contracts were finally up.

The *Michelle Irene* is one of over 60 factory trawlers that fish the waters of the Bering Sea and the Gulf of Alaska. These trawlers have taken over an industry that was once the province of fleets from Japan, Korea and the Soviet Union. Many thousands of Americans now work in the Alaskan factory trawler fleet.

2. Defendants' Breach of Contract

Defendants paid the crew of the *Michelle Irene* on a "crewshare" basis, which is the way in which fishermen have been paid throughout the ages. Each crew member signed a written contract in which defendants promised to set aside for the crew 26.086% of the "estimated ex-vessel fair market value of the saleable product, FOB Alaska." (App. C at ¶ 10). The defendants promised that each crew member would get a share of the funds set aside equal to his or her individual crewshare, divided by the

sum of the crewshares held by all crew members aboard. (*Id.*)

Defendants breached their crewshare agreements in two ways. First, defendants used a fraction of the real value of the catch when computing crewshares. Defendants sold most of the *Michelle Irene*'s fish in Japan on consignment. Each time the vessel delivered fish to a tramper in Dutch Harbor, defendants' consignment broker, Kyokuyo Co., Ltd., furnished defendants with a detailed estimate of the market value of the product.[3] Defendants admit that they based crewshares, not on the full value of this estimate, but on only 90% of it. If the Kyokuyo estimate was the most accurate estimate available when the crew was paid (and defendants have

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[3] The fish was later sold by Kyokuyo in Japan, long after the voyage ended and the crew had been paid.

produced no other), then plaintiffs have been deprived of 10% of their wages.

Second, defendants failed to pay the crew the full 26.086% of the catch that they had promised to pay. Instead, defendants kept a portion of the crew's share of the estimated value of the catch for themselves. Documents produced by defendants show that, depending on the trip, defendants held back, and kept for themselves, between 4.6% and 18.0% of the portion of the catch that belonged to the crew.

3. The Six Month Limitation Provision and the Defendants' Failure to Explain It

The contracts that defendants gave the crew to sign consisted of five pages of single-spaced type. They were drafted by defendants and presented to plaintiffs on a take it or leave it basis. All of the contracts signed by the plaintiffs contained a provision purporting to require

the plaintiffs to bring any claims within six months.[4]

Defendants' contracts were unquestionably contracts of adhesion. Out of over 400 contracts signed by crew members covering the relevant time period, not one DISPUTES paragraph, the paragraph that contained the limitation provision, was altered one iota as a result of a negotiation with a crew member.

The crew members had no notion of any rights they might be giving up by "agreeing" to the DISPUTES clause. Defendants

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[4] Two different forms of this provision were used during the class period. One version provided:

> . . . Crewmember agrees that any legal action commenced by Crewmember in connection with this Agreement shall be brought within six (6) months after the date of the action or shall thereafter be waived. . . .

The other version provided:

> . . . Any claim for money arising out of this agreement or employment relationship between crewmember and owner shall be made in writting (sic) within six (6) months after this agreement is terminated; otherwise, such claim shall be deemed waived.

(See *e.g.* App. C at ¶ 15).

admit that they did not discuss with crew members the rights they were giving up. The agents of defendants who dealt with the crew members conceded in deposition that they themselves did not know the limitation period for crew wage claims in the absence of a contractual limitation provision. Consequently, they were unable to advise crew members of the rights they were giving up by agreeing to bring claims in six months.

Defendants also left most crew members with no chance to discover the six month limitation after they realized that they had some claim to make. The representative plaintiffs were not given copies of their contracts.[5] The defendants even refused to honor the express requests of one represen-

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[5] Although defendants claim that they offered crew members copies of their contracts (a claim disputed by some crew members), they admit that a majority of the crew members did not actually get copies.

tative plaintiff, Rita Fuller, that copies be sent to her home address.

Consequently, the plaintiffs did not learn of the limitation period contained within their contracts until defendants produced them after this lawsuit was filed.

4. The Difficulty of Discovering Claims Within Six Months

It was very difficult for these seamen to discover they had claims in the six months their contracts purported to allow. The crewshare settlement sheets furnished by defendants contained no information which would alert the crew to the fact that their crewshares had not been paid in accordance with the terms of their agreements. The settlement sheets showed an "extended value" figure upon which each individual's crewshare had been calculated. (App. D) The crew was not told that "extended value" really meant 90% of the broker's estimate of the real value. The

crew was not even furnished with an accounting of the various species of fish caught and products produced so they could make their own estimate of the value of those products. Moreover, although the settlement sheets showed the individual crew member's percentage of the total "extended value," they did not show the aggregate percentage paid to the whole crew, which would have disclosed that defendants were not paying the crew the full 26.086% that they had promised to pay.

The only way for plaintiffs to discover whether they had a claim was to obtain and analyze copies of defendants' accounting records, which is a task they could hardly do in the six months allowed them by their contracts, even assuming that they had enough notice of a claim to realize they should be demanding records from the company.

The courts below held that the representative plaintiffs should have known they had claims because of a prior lawsuit against most of the same defendants brought by crew members who worked aboard the *Michelle Irene* during an earlier period. *Adamek v. Golden Age*, No. C89-1463R (W.D. Wash.) However, plaintiff Babbette Thayer was not even part of the *Adamek* class, and plaintiffs Rita Fuller and Tom Wilson were only *unnamed* class members.

Adamek settled for $510,000, plus plaintiffs' attorneys fees, and checks were sent out to Ms. Fuller, Mr. Wilson and the other class members in August 1991. It was not until plaintiffs got their checks that they realized that the claims that others had asserted in *Adamek* might be real. They then acted promptly and brought this suit in less than 90 days.

IX. REASONS FOR GRANTING THE WRIT

A. Whether Shipowners Can Impose a Six Month Limitation Period On Seamen's Claims In an Adhesion Contract Is an Important Question That Was Resolved Below in a Way That Conflicts With Precedent in This Court

The protection of seamen has been an important goal of our federal court system since its earliest days. "The maritime law by inveterate tradition has made the ordinary seaman a member of a favored class." *Warner v. Goltra*, 293 U.S. 155, 162 (1934). The Court of Appeals' holding that a shipowner can impose a six month limitation period upon wage claims asserted by members of this favored class is a substantial departure from this tradition that should be reviewed by this Court.

1. Seamen Are the Wards of the Court Entitled to Special Protection Under Admiralty Law

> Seamen, like the plaintiffs here, are emphatically the wards of the admiralty; and . . .they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with

> their expectancies, wards with their guardians, and *cestuis que trust* with their trustees.

Garrett, 317 U.S. at 246, quoting *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1823)(No. 6,047). The classic statement of the traditional deference given to seamen's rights by the federal courts was made in 1823 by Justice Story:

> [T]he most rigid scrutiny is instituted into the terms of every contract in which they [seamen] engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which is not compensated by extraordinary benefits on the other, judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party and that pro tanto the bargain ought to be set aside as inequitable.

Harden v. Gordon, 11 F. Cas. at 485.

The characterization of seamen as wards of the court is based on their unique position in society:

> From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his

> personal liberty during the life of the contract.

Robertson v. Baldwin, 165 U.S. 275, 282-83 (1897). It is also based on the unusual degree of bargaining power that employers have over seamen:

> If their employers chose to impose upon them hard terms, they are obliged to take what is offered to them and meet their immediate wants or forthwith to reship on another vessel. They are thus placed too much in the power of the owners to be able to negotiate with them on equal terms.

The David Pratt, 7 F. Cas. 22, 24 (D.C. Me. 1839) (No.3,597)[6] Consequently, the federal court's traditional protection of seamen has its greatest significance where the right to recover wages is implicated:

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[6] *See also Capotorto v. Compania Sud Americana de Vapores, Chilean Line, Inc.*, 541 F.2d 985, 987 (2d Cir. 1976) (the notion of seamen as wards of the court stems in part from "the particularly authoritarian relationship of shipowners and their representatives to seamen and the isolation of the latter from the legal, economic and psychological support of the land based community"); *Harris v. Lykes Bros. Steamship Co., Inc.*, 375 F. Supp. 1155, 1157 (E.D. Tex. 1974) (the notion stems from the nomadic nature of seamen and the perils they encounter at sea).

> It is the established policy of the maritime law to protect from **any** impairment the seaman's historic right to wages for the term of his employment.

Vitco v. Joncich, 130 F. Supp. 945, 951 (S.D.Cal. 1955) (emphasis added), *aff'd*, 234 F.2d 161 (9th Cir. 1956).

The policy of extending special protection to seamen is reaffirmed from time to time by this Court, which repeated in *Isbrandtsen*, 343 U.S. at 783, what it had said in the late 19th century: "the ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly." *Id.*, *quoting Robertson v. Baldwin*, 165 U.S. 275, 287 (1897). In *Isbrandtsen*, this Court quoted from the leading treatise on the law of seamen:

> In my dealings with seamen, a class with whom I come in frequent contact, I find that they are perhaps better educated and better dressed than their fellows of a century ago, but, in general, as improvident and prone to the extremes of trust and suspicion as their forebears who ranged the seas, but withal a likeable lot.

Id. at n.5, *quoting* 1 Norris, *The Law of Seamen* (1951), Preface.

2. The Limitation Provision Is Unenforceable Because It Is Not Fair, Fully Understood By the Seamen, Nor Supported by Adequate Consideration

A contractual provision that impinges on a seaman's rights is enforceable against a seaman, only if the provision would be enforceable had a fiduciary imposed it upon his beneficiary.

> The analogy suggested by Justice Story [in *Harden v. Gordon*] between seamen's contracts and those of fiduciaries and beneficiaries remains, under the prevailing rule treating seamen as wards of admiralty, a close one. Whether the transaction under consideration is a contract, sale or gift between guardian and ward or between trustee and cestui, the burden of proving its validity is on the fiduciary. He must affirmatively show that no advantage has been taken; and his burden is particularly heavy where there has been inadequacy of consideration.

Garrett v. Moore-McCormack, 317 U.S. at 247.

The mode of analysis required by this court in *Garrett* has long been followed in the federal admiralty courts:

> Whenever . . . any stipulation is found in the shipping articles, which derogates from the general rights and privileges of seamen, courts of admiralty hold it void . . . unless two things concur: first, that the nature and operation of the clause is fully and fairly explained to the seamen; and secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them thereby.

Brown v. Lull, 4 F. Cas. 407, 409 (C.C. Mass. 1836)(No. 2,018).[7]

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[7] See also *Harmon v. United States*, 59 F.2d 372, 373 (5th Cir. 1932) ("[O]ne who claims that a seaman has signed away his rights. . .must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman. . . . This rule of course is most rigidly applied to clauses in shipping articles."); *Elliott v. Pacific Far East Line, Inc.*, 230 F.2d 238, 240 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955) (mutual release held enforceable because the seaman entered into it "without complete understanding of the situation"); *Lewis v. Texaco, Inc.*, 527 F.2d 921, 925 (2d Cir. 1975) (seamen's releases of wage claims did not bar suit where the seamen were not made fully aware of their statutory rights prior to settlement); *The Sarah Jane*, 21 F. Cas. 449, 452 (S.D.N.Y. 1833) (No. 12,348) ("Every stipulation binding a seaman, beyond the rate of wages, the time of their payment and the voyage to be performed, is . . . looked upon with distrust, and is closely scrutinized before it is executed . . .)

Garrett held that the release with which the court was than dealing would be held valid only if the shipowner carried his burden of showing that:

> it was executed freely, without deception or coercion, and that it was made by the seaman with a full understanding of his rights. The adequacy of consideration and the nature of the . . . advice available to the seaman at the time of signing the release are relevant to an appraisal of that understanding.

Garrett 317 U.S. at 248. The limitation at issue here survived scrutiny only because the courts below failed to follow the analysis demanded by *Garrett*.

Heightened scrutiny is warranted here because defendants gave no consideration to the crew for their agreement to the short limitation period. By agreeing to the limitation period, they gave up a valuable right. Absent the contractual limitation period, seamen's wage claims against their employer are time-barred only by the doctrine of laches. *Espino v. Ocean Cargo*

Line, Ltd., 382 F.2d 67, 69 (9th Cir. 1967)(Laches will bar a seaman's claim only if the delay in commencing the action is inexcusable, and the defendants are prejudiced by the delay.)[8] By signing their contracts the crew gave up the often lengthy time period allowed by the laches doctrine, and they got nothing in return.

There was no evidence in the record to support a finding that the defendants carried their burden of showing that the plaintiffs had a full understanding of the rights they were giving up by agreeing to the six month limitation period. The defendants' behavior does not withstand any analysis, let alone the heightened scrutiny that *Garrett* demands.

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[8] Plaintiffs' claims would not be barred by laches here. They filed suit only 11 months after the conclusion of the last voyage at issue, and defendants do not contend that the delay prejudiced them in any way.

No one ever explained to plaintiffs the rights they had. Neither the plaintiffs, nor the defendants' agents with whom they dealt, were aware that seamen's wage claims are governed by the doctrine of laches in the absence of a limitation period.[9] And no one ever bothered to point out the limitation period to the crew in a way they would notice it. It is undisputed that the plaintiffs did not learn that they had only six months to bring their claims until this lawsuit was filed.

Defendants did not even provide most crew members with copies of their contracts. Most of the crew had no chance to discover the limitation provision once they suspected they might have a claim, and, consequently had no idea that they needed

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[9] Washington law gives those who sign written contracts six **years** to bring those claims. Wash. Rev. Code 4.16.040. Needless to say, none of defendants' agents explained to the seamen that, as to their state law claims, they were exchanging that six year period for a six month period.

to move quickly to preserve their rights. Shipowners must do more than defendants did here to satisfy the high standard to which a fiduciary is held in his dealings with his beneficiary.

Even if defendants had told the crew members of the limitation provision and of the rights they were relinquishing, the clause in question should still be stricken as inherently unfair. At the time the defendants drafted this clause, they knew just how little information would be available to crew members when they received their pay. Defendants knew that the limited information they would supply the crew would not alert them to the possibility of a claim. They knew that the crew would have little chance of bringing their claims within the six month period that their contract demanded.

The information defendants did not reveal in their settlements with the crew

was crucial to the crew's ability to discover whether they had a claim. The crewshare agreements provided that shares would be calculated based on an "estimated value." (App. C at ¶ 10). When it came time to pay shares, defendants did not tell the crew that they were paying shares based on less than the full estimate; they did not even tell the crew the price they were using for any particular species of fish. There was no way for a crew member to know that he was not being paid the full value of the catch. (See Settlement Sheet -- App. D).

Another significant omission in defendants' accounting is their failure to tell plaintiffs the total number of crewshares issued on any voyage. Without this information, crew members had to trust that defendants calculated correctly the ratio of each individual crew member's share to the total number of shares. But, again defen-

dants deceived the crew, this time by failing to tell them that some of their crewshares were being siphoned off to the owners' own bank account. These practices, and defendants' concealment of them, are glaring examples of overreaching by defendants, who are supposed to act as fiduciaries in their dealings with their beneficiaries.

By attempting to limit the crew members' rights to question their pay to a six month period, defendants knowingly placed these crew members in an untenable position. Many of them were off on their next voyage within days or weeks after they were paid. For many crew members much of the six months given them by their contracts ran while they were at sea, unable to communicate with a lawyer, away from the courthouse, and, all the while, under their employers' close control.

The way in which plaintiffs were taken advantage of here demonstrates that they are just as susceptible to the influence exerted by shipowners as the seamen of yore. Like seamen of the nineteenth century, they were "placed too much in the power of the owners to be able to negotiate with them on equal terms." *The DAVID PRATT*, 7 Fed. Cs. at 24. The limitation clause that the *Michelle Irene* crew had thrust upon them is inherently unfair, and, under the analysis demanded by *Garrett*, unenforceable.[10]

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[10] Even outside the maritime law of seamen's contracts, the provision at question would fail under the facts of this case. Where a party to an adhesion contract has not had adequate opportunity to learn of a time limit provision, it will not be enforced. *See Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11, 17 (2d Cir. 1968)(limitation in passenger ticket unenforceable unless steamship company did "all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights."); *Muratore v. M/S/ Scotia Prince*, 845 F.2d 347 (1st Cir. 1988)(refusing to enforce time bar provision in passenger ticket where cruise line failed to deliver a copy of the contract to the passenger), *accord Barbachym v. Costa Line, Inc.*, 713 F.2d 216 (6th Cir. 1983).

The contrary decision of the Court of Appeals was only reached because the Court misapplied the precedent discussed above. The Court of Appeals held that the facts outlined did not "present a genuine issue of material fact about whether the signing of the contracts involved fraud or coercion." 14 F.3d at 1408 (App. A at 12-13). For support of that statement the Court noted only that the seamen had time to review their contracts before signing, if they wished to do so. The Court of Appeals did not hold the employer to his burden of showing that the contract "was executed freely, without deception or coercion, and that it was made by the seaman with a full understanding of his rights." *Garrett* 317 U.S. at 248. It was enough for the Court of Appeals that the seamen had not proven fraud; it did not matter to the Court of Appeals whether the seamen actually had any real understanding of what they were doing.

The Court of Appeals failed to follow the analysis demanded by this Court. The petition should be granted to determine the enforceability of a short limitation period in seamen's wage contracts.

B. Whether §10602's Narrow Wage Claim Remedy Preempts the General Maritime Remedy of Fishermen to Sue Their Vessels Is an Important Question That Was Resolved Below in a Way That Conflicts With Precedent in This Court

This court has consistently held that statutes affecting the remedies available to seamen must be construed to improve the lot of seamen:

> Marine legislation, at least since the Shipping Commissioners Act of June 7, 1872, 17 Stat 262, should be construed to make effective its design to improve the lot of seamen.

Isbrandtsen v. Johnson, 343 U.S. 779, 783 (1952); *Garrett*, 317 U.S. at 246 ("Congress has generally sought to safeguard seamen's rights."). Since Congress never writes on a clean slate when it comes to federal maritime law, the rules of construction are

different than in other areas. Statutes in derogation of the general maritime law are strictly construed:

> Statutes which invade the . . . general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.

Isbrandtsen, id.; accord, Federal Marine Terminals v. Burnside Shipping Co., 394 U.S. 404, 412 (1969) ("[T]he legislative grant of a new [federal maritime] right does not ordinarily cut off or preclude other nonstatutory [federal maritime] rights in the absence of clear language to that effect.")

The Court of Appeals concluded that 46 U.S.C. §10602 cut off lien rights that the general maritime law gave to all fishermen. This conclusion is not warranted by the statutory language, is not supported by the legislative history, and is plainly contrary this Court's holdings on the con-

struction of statutes in derogation of seamen's rights. This Court should grant certiorari to determine the important issue of whether §10602 has cut off the right of fishermen to make wage claims under the general maritime law.

1. The General Maritime Law Has Given Fishermen an *In Rem* Remedy Since the Middle Ages

A fisherman's *in rem* claim arises from general maritime law, which finds its origins in European codes promulgated beginning in the middle ages. *See Mitchell v. Trawler Racer*, 362 U.S. 539, 543 (1960). About a century before our Constitution was adopted, the old codes were comprehensively rewritten in the *Marine Ordinances of Louis XIV*, 30 F. Cas. 1203, enacted in 1681. *Id.* Gilmore and Black call the Marine Ordinances the "classic" "authoritative codification" of the law of the sea. Gilmore and Black, *The Law of Admiralty* at 8 (2d ed. 1975). This Court has called

them "the foundation of all codes." *Tucker v. Alexandroff*, 183 U.S. 424, 442 (1902).

The Marine Ordinances state unequivocally that the "ship and freight shall be specially liable for the seamen's wages." Title Fourth, Article XIX, 30 Fed. Cs. 1210.[11] This ancient seaman's wage lien was incorporated into the admiralty law of the United States by the Constitution when it was enacted in 1789. *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 385-86 (1924). The seaman's wage lien has been consistently recognized since as one of the

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[11] The general maritime law gave this *in rem* claim to fishermen who, like plaintiffs, were paid based on a share of revenues generated during the voyage. In the centuries past it was common for seamen to be compensated based on a share of the revenue generated by the voyage. *Putnam v. Lower*, 236 F.2d 561, 579 (9th Cir. 1956). Shipping on a share of the catch or share of the freight basis was common enough in the middle ages for the ancient codes to expressly recognize the practice. *See e.g. Marine Ordinances of Louis XIV*, at Title Fourth, Article VII, 30 F. Cas. 1203 (referring to seamen who ship "by the profit or freight"); *Laws of Oleron*, at Article XIX, 30 F. Cas. 1171 (comparing rights of those who ship for monthly wages with those who ship for "a share of the freight"); *Laws of Wisbuy*, at Article XXXII, 30 F. Cas. 1189.

fundamental principles of maritime law. *See, e.g., The Mary*, 16 F. Cas. 936 (S.D.N.Y. 1832) (No. 9,186) (Seamen's wage liens "are 'sacred liens,' and as long as a plank remains, the sailor is entitled as against all other persons to the proceeds as security for his wages.") As one Supreme Court Justice said over 130 years ago, the seamen's wage lien is among those "principles of law that have been so long and so well established that it is sufficient to state them without referring to authorities." *Taylor v. Carryl*, 61 U.S. (20 How.) 583 (1858)(Taney, J., dissenting).

2. Congress Expressly Preserved Non-Statutory Remedies in §10602(c)

Section 10602(a) provides an *in rem* remedy for fishermen who fish in a certain way under a written agreement:

> When fish caught under an agreement under 10601 of this title *are delivered to the owner of the vessel for processing and are sold*, the vessel is liable

> in rem for the wages and shares of the proceeds of the seamen. An action under this section must be brought within six months after the sale of the fish.

(emphasis supplied).

The statute gives a remedy **only** to fishermen and fish processors, only if they sign the written agreement required by §10601, and, even then, **only if** their fish "are delivered to the owner of the vessel for processing and are sold." The statute provides no remedy to merchant seamen, no remedy to fishermen who ship on an oral contract, no remedy to fishermen whose fish are sold by the owner prior to processing, and, arguably, no remedy even to plaintiffs whose fish is processed aboard prior to delivery to anyone.[12] Congress could not have intended this narrow and unusual

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[12] Plaintiffs argued below that they were not even covered by the statute. The Court of Appeals dismissed this argument, stating only that the shipowner owned the boat as well as the processing equipment, so that delivery could be implied. (App. A at note 4).

statute to occupy the field of fishermen's wage liens.

A literal reading of the statute leads to a conclusion contrary to that of the Court of Appeals. Section 10602(c) states that the statute "does *not affect a common law right* of a seaman to bring an action to recover the seaman's share of the fish or proceeds." The language Congress used is a strong argument that it intended the usual presumption to prevail -- that the statute provides a cumulative remedy and that it does not diminish existing remedies provided to seamen by the general maritime law. By using the words "common law," Congress meant to refer to non-statutory law, the same meaning often ascribed to the term by the courts. *See e.g. Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 422 (1954) (Referring to non-statutory maritime law as "maritime common law"); *Federal Marine Terminals v. Burnside Shipping Co.*,

394 U.S. at 411 (Stating that the Court of Appeals decision that there was no "common law direct action" was equivalent to a holding that there would be no "federal maritime action," in the absence of a statutory source for the remedy.)

The Court of Appeals proved the point in the very sentence it used to hold that §10602 preempted plaintiffs' non-statutory claims. The Court of Appeals wrote: "When Congressional legislation directly addresses a question, that legislation preempts existing federal common law." 14 F.3d at 1408 (App. A at 9). What the Court of Appeals did not recognize is that preemption does not occur when Congress expressly preserves common law claims, as it did in §10602(c).[13]

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[13] To add emphasis to the point that Congress did not intend §10602 to diminish the rights of seamen, it added an express qualifier to the provision establishing the six month limitation provision. The limitation provision applies only to an "action under this section." Congress did not want there to be any misunderstanding that

3. Legislative History Shows that Congress Intended §10602 to Provide a Cumulative Remedy

The statute's purpose as a cumulative remedy for a narrow class of plaintiffs may be understood by examining its eighteenth century origins.

The original purpose of the predecessor of §10602 was to ensure that fisherman got their share of salt allowances or bounties that the federal government paid to those engaged in the cod fisheries. In 1792 the Second Congress passed the predecessor of §10602. Act of February 16, 1792 § 5, 1 Stat. at 229, 230. It was part of an act whose purpose was to compensate fishermen and vessel owners for the added cost of duties on imported salt used to preserve "dried fish." *Id.* at § 1. Application of the act was limited to vessels and fishermen "carrying on the bank and other cod

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fishermen would have only six months to bring actions under general maritime law.

fisheries," *id.*, because dried salt cod was the product that most utilized imported salt.[14]

Consistent with this limited purpose, the act provided cod fishermen with an *in rem* remedy to recover their share of the bounties and the proceeds of the fish after it was given to the vessel owner for curing:

> [Where the fish] shall be delivered to the owner or to his agent, for cure, and shall be sold by the owner or agent, such vessel shall for the term of six months after such sale, be liable and answerable for the skipper's and every other fisherman's share of the fish. . .

In the 200 years since the statute was enacted Congress has not materially expanded its scope. The salt bounties were

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[14] The predecessor of §10601, which was contained in the same act, provided that the bounties were available only to vessels that entered into written contracts with their fishermen. *Id.* at § 4. The purpose of this section was to provide a written record of the fisherman's right to the bounties. *See Crowell v. United States*, 6 F. Cas. 912 (C.C.D. Mass. 1856)(No. 3,447)(Right to bounty ceases if any material portion of fisherman contract is not in writing.)

finally repealed in 1866, but the remainder of the statute continued virtually unchanged until 1988.

In 1988 Congress changed the word "cure" to "processing" and eliminated the portion of the act that restricted it to the cod and mackerel fisheries.[15] *Id.* The legislative history shows that Congress believed that the changes were immaterial. The 1988 revision was tacked onto the end of the Commercial Fishing Vessel Safety Act of 1988, P.L. 100-424, 102 Stat. 1585, 1591-92. The House Committee on Merchant Marine and Fisheries published an extensive report on the act, but the report ignored the changes to §10602. *See* 1988 U.S. Code Cong. and Admin. News, at 2149 *et seq.* Although both the House and the Senate debated passage of the act, no representa-

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[15] In 1865 Congress had extended the act to include both the cod and the mackerel fisheries. Act of March 3, 1865, 13 Stat. Ch. 117.

tive nor senator acknowledged the existence of either §10601 or §10602. Cong. Record - House June 27, 1988; Cong. Record - Senate August 11, 1988 (both considering debate on H.B. 1841). The lack of any mention of the changes in the legislative history belies any inference that Congress intended to make a major change in the law of seamen's wage claim remedies. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979)("This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.")

4. The Merchant Seamen's Equivalent to §10602 Provided a Cumulative Remedy Only

The treatment accorded a similar statute by the admiralty courts is strong evidence that §10602 is not the fisherman's exclusive *in rem* remedy. In 1790, two years before Congress enacted the predecessor of §10602, it passed a similar act that gave

an *in rem* remedy to merchant seamen, provided they followed procedures set out in the statute for summoning the vessel master to show cause why the vessel should not be arrested. *Murray v. Ferry-Boat Nimick*, 2 F. 86, 87 (W.D.Pa. 1880)[16] In *Murray* the issue was whether the show cause procedure was the exclusive *in rem* remedy available to merchant seamen. The court held that it was not; the merchant seaman's general maritime remedy was preserved, and the statute conferred an alternate remedy:

> [T]he remedy conferred by the statute is not exclusive, but cumulative. . . the right of the seaman to arrest the vessel is not dependent upon a previous resort to the statute.

Murray, 2 F. at 88. The court based its decision on the maritime rule of construction that was echoed 70 years later by this Court in *Isbrandtsen*:

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[16] The statute survived until 1983, most recently as 46 U.S.C. §§ 603 & 604.

> [U]nder the maritime law, the well settled rule of construction [is] that where a statute provides a new remedy it is cumulative, unless the statute expressly or by necessary implication takes away the common law remedy.

Id.

The statute at issue in *Murray* could be read to be the exclusive *in rem* remedy for merchant seamen much more easily than §10602 could be read to be a fisherman's exclusive *in rem* remedy. The merchant marine statute required a finding of just cause before the vessel could be arrested: "If the master against whom such summons is issued . . . fails to show the wages are paid . . . the clerk of such court shall issue process against the vessel." 46 U.S.C. § 604 (repealed 1983). Despite this language courts held that a merchant seaman could have his vessel arrested without resort to the show cause procedure - if he based his claim on the general maritime law. The strong policy that resulted in

the merchant seamen having both a statutory and a general maritime *in rem* remedy requires the same result here.

5. The Statute's Punitive Remedy for Failure to Provide an Accounting Explains the Short Limitation Period

Section 10602 has always provided an accounting remedy that is in addition to what is provided by the general maritime law. The current version, §10602(b)(1), reads:

> In an action under this section, the owner shall produce an accounting of the sale and division of proceeds under the agreement. If the owner fails to produce the accounting, the vessel is liable for the highest value alleged for the shares. . . .

In the 18th and 19th centuries this right to an accounting in admiralty was a substantial benefit not provided by the general maritime law. *See The Fair Play*, 8 F. Cas. 957, 957-58 (S.D.N.Y. 1830)(No. 4,615).

The provision for an accounting was included in the 1792 act because, if the vessel owner did his own salting and drying, the fishermen would not receive their shares until the fish was eventually sold well after the voyage. By the time of sale, the fish could well have been commingled with the fish of other vessels or other voyages and an accounting would be necessary to sort out what any one fisherman was owed. To insure that the owner kept the paperwork needed to provide the accounting, the act set forth the penalty provision that survives to this day -- a fisherman is entitled to the "highest value alleged for the [fisherman's] shares," if the shipowner does not provide the accounting required by the statute. §10602(b)(1).

It is this punitive remedy that explains the statute's six month limitation provision. Congress did not wish to give any fisherman the opportunity to delay his

claim beyond the time when it would be unreasonably difficult for the owner to provide an accounting. Congress determined that six months, beginning on the date the accounting could first be done, *i.e.* the date the fish was sold, was a reasonable balancing of the fishermen's need for time to make a claim, against the sting of the punitive remedy that would assessed against the owner in the event that the passage of time made an accounting impossible.

The Court of Appeals dismissed plaintiffs' argument that the statute did not preempt general maritime law with the statement that the statute "directly addresses the question" and with a single citation to *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). In *Mobil Oil* this Court declined to supplement the Death on the High Seas Act ("DOHSA") cause of action with a claim for non-economic damag-

es.[17] In 1920 Congress created the cause of action by enacting DOHSA, which spelled out who could recover, who could be sued, and what damages could be awarded. *Mobil Oil* simply held that the courts could not now add new damage claims to those chosen by Congress. The case here is very different. Unlike DOHSA, §10602 is hardly comprehensive, it applies only to fishermen, only if they sign written contracts, and only if their product is delivered to the owner for processing. Moreover, the issue here is not whether the courts can ***add*** to the remedies specified by Congress, which was the issue in *Mobil Oil*, but whether Congress chose to ***eliminate*** traditional remedies granted by the general maritime law. Consequently, the Court of Appeals should have followed a totally different

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[17] General maritime law traditionally did not provide a wrongful death cause of action. *The Harrisburg*, 119 U.S. 199 (1886).

analysis. Finally, in §10602, unlike in DOHSA, Congress expressly stated its wish to preserve common law remedies.

The limitations framework left in the wake of the Court of Appeals *Fuller* decision is nonsensical. There is no reason for certain fishermen's wage claims to have a six month limitation period, while the claims of merchant seamen are governed by laches. There is no reason for Congress to give fishermen a lien *only* when their fish is processed ashore by the owner, and not otherwise. And, there is no reason for Congress to make *in rem* claims brought by fishermen who signed written agreements subject to the six month statutory limitation period, while fishermen who fish on oral agreements have the longer period afforded by the doctrine of laches.[18]

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[18] In other areas of the law the limitation period for breach of a written contract is universally as long or longer than the period for breach of an oral contact for the obvious reason that

Congress could not have had the intention ascribed to it by the Court of Appeals. It is much more likely that Congress intended that the six month limitation period of §10602 apply only to claims brought under that unique statute, and that seamen continue to retain the remedies traditionally afforded them by the general maritime law, which are subject to being time barred only by the dictates of the laches doctrine.

X. CONCLUSION

A six month limitation period severely diminishes the remedy available to seamen. In no other walk of life do workers face so short a limitation period for bringing a claim for wages. The decision below is a major departure from the deference that

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of the terms of a written contract is not dependent on the fragile memories of the contracting parties. *Compare e.g.* Wash. Rev. Code 4.16.040 (six year limitation period for actions on a written contract) with Wash. Rev. Code 4.16.080 (three year limitation period for actions on a oral contract).

this Court has consistently held is owed to the seamen of our nation. It turns long standing federal policy mandating extra protection for seamen on its head by leaving seamen in worse shape than their land based colleagues.

The impact of the decision goes far beyond the several hundred members of the plaintiff class. For most of the thousands who work 16 hour days for months at a time on the modern factory trawlers of the North Pacific fleet, as well as the tens of thousands of fishermen and process workers who ship out of ports nationwide, the six month limitation period severely undercuts traditional seamen's remedies. The decision's impact will not stay within the fishing industry. The restrictive six month limitation clause will soon become a standard clause in every merchant mariner's contract.

But even more significantly, the decision below reflects the abandonment of a principle, the principle that seamen are in need of and entitled to the special protection of our federal courts. This Court has assigned great importance to the protection of seamen since the earliest days of our Republic. The working conditions that the plaintiffs endured on the *Michelle Irene*, and the ease with which defendants managed to cheat them out of a portion of their wages, are proof that the need of seamen for this Court's special protection is as great today as it has ever been.

The petition should be granted.

Respectfully submitted,

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